

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ALBERT AND HELEN MA
Plaintiffs

V.

NO. 1:97CV56-B-D

CITY OF COLUMBUS, et al.
Defendants

MEMORANDUM OPINION

This cause comes before the court upon the defendants' motion for partial summary judgment. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

The plaintiffs are attempting to build a house in an upscale neighborhood in Columbus, Mississippi. Towards that end, they obtained a building permit and began construction in 1995. When the construction was approximately 50% complete, the City of Columbus issued a stop work order and revoked the plaintiffs' building permit. The plaintiffs have filed suit seeking an order allowing completion of the home as designed and an award of actual and compensatory damages. The plaintiffs assert that the defendants have violated their federal constitutional rights as well as the right to substantive and procedural due process afforded by the Mississippi Constitution. The defendants have filed a motion for partial summary judgment, seeking the dismissal of all claims based upon violation of state law.

LAW

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

The defendants have moved for partial summary judgment as to the plaintiffs' state law claims on the grounds that they are entitled to sovereign immunity pursuant to the Mississippi Tort Claims Act ("MTCA"), codified at Miss. Code Ann. §§ 11-46-1 et seq. The defendants further assert that the plaintiffs have failed to file a notice of claim prior to filing suit, as required by Miss. Code Ann. § 11-46-11(1). The plaintiffs respond that sovereign immunity, and thus the MTCA, does not apply to protect the defendants from liability for violations of the Mississippi

Constitution.

The issue of whether sovereign immunity applies to constitutional torts depends upon the nature of the relief sought by the plaintiffs. While sovereign immunity may protect municipalities from claims for damages for constitutional violations, sovereign immunity does not prevent plaintiffs from seeking declaratory relief. State v. Hinds County Bd. of Supervisors, 635 So. 2d 839, 842 (Miss. 1994).¹ A review of the plaintiffs' complaint reveals that the plaintiffs are seeking both declaratory relief, in the form of an order allowing completion of the house, as well as actual and compensatory damages. Although the claim for actual and compensatory damages may be subject to dismissal under the MTCA, the MTCA has no application to the plaintiffs' claim for declaratory relief. Thus, the plaintiffs' claim for declaratory relief may not be dismissed on the grounds of either sovereign immunity or failure to comply with the notice requirement of the MTCA.

However, the plaintiffs' claim for actual and compensatory damages under state law is subject to application of the MTCA. Section 11-46-11(1) provides that plaintiffs must file a

¹ The plaintiffs cite Tucker v. Hinds County, 558 So. 2d 869 (Miss. 1990), in support of their position. In Tucker, the plaintiff sued Hinds County for causing Mississippi Power and Light to discontinue Tucker's service. Tucker sought actual and punitive damages. The Mississippi Supreme Court held that sovereign immunity will not protect a political subdivision where there has been a violation of the plaintiff's constitutional rights. Tucker, 558 So. 2d at 872-874. The court did not address the issue of the relief sought. Although Tucker appears to support the plaintiffs' position, this court is inclined to follow the precedent set forth by the Mississippi Supreme Court in State v. Hinds County Board of Supervisors, which was decided after Tucker. The Mississippi Supreme Court in State v. Hinds County Board of Supervisors cites Tucker as support for the proposition that sovereign immunity does not apply when the relief sought was a declaration that a particular statute or action of the State was unconstitutional. State v. Hinds County Bd. of Supervisors, 635 So. 2d at 842. The court then states that the State cannot be held liable for damages if the conduct falls within one of the exceptions listed in Miss. Code Ann. § 11-46-9. Id. Thus, in accordance with State v. Hinds County Board of Supervisors, this court finds that the provisions of the MTCA apply to any claims under state law for damages against a municipality.

notice of claim with the chief executive officer of the municipality at least ninety days prior to filing a complaint. This notice requirement is a jurisdictional prerequisite that must be fulfilled in order to maintain a suit against the municipality. Simpson v. City of Pickens, 887 F. Supp. 126 (S.D. Miss. 1995). Upon consideration of the evidence presented, the court finds that the plaintiffs have failed to comply with the notice requirement set forth in § 11-46-11(1). Thus, the court finds that the plaintiffs claim for actual and compensatory damages pursuant to state law should be dismissed without prejudice.

CONCLUSION

For the foregoing reasons, the court finds that the defendants' motion should be granted as to the plaintiffs' claim for actual and compensatory damages under state law and denied as to the plaintiffs' claim for declaratory relief. An order will issue accordingly.

THIS, the ____ day of July, 1997.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE